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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1023~~ 70-278

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* THE DEPARTMENT OF PUBLIC WORKS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One.

REPLY BRIEF.

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REPLY BRIEF.

Introduction.

Petitioners respectfully submit this Reply Brief because the Respondent's Brief displays a lamentable lack of candor with the Court, compelling a reply.

The Document Attached to the Respondent's Brief as Appendix A Is Spurious in That No Such "Findings" Were Ever Made by Any Court and Said Document Was Never Signed by Any Court.

The Court may have noted that the document appearing as Appendix A to the Respondent's Brief does not bear the Superior Court's "Filed" stamp and that it is undated and unsigned. This abortive document was

prepared by the trial judge, but on advice of counsel for the trial court in the writ proceeding[1] it was never signed or filed by the trial court.

The reason was that the proposed "findings" consisted in equal parts of lengthy, argumentative [and inaccurate] "justifications" for the holding of Mr. Fadem in contempt, which in fact had nothing whatsoever to do with the acts asserted to be contempt,[2] and of matters which were simply untrue. At pages 4-5 of Respondent's Appendix A the Court will observe quotations from the reporter's transcript liberally interspersed with the trial judge's characterizations, and repeated assertions that Mr. Fadem was using ". . . a loud and belligerent voice".

It so happened, however, that the court reporter was using a magnetic tape recorder in addition to her stenotype machine. In chambers, promptly after the purported contempt, Mr. Fadem requested that the magnetic tape be forthwith impounded so that reviewing Courts could have objective evidence in the writ proceedings, indicating whether the reference to "loud and belligerent" voice had any substance (See pp. 23-25 of Appendix B to Petition for Writ of Certiorari). The trial judge refused. Thereupon the magnetic tape was subpoenaed [Clk. Tr. 657]. After the magnetic tape was produced and heard by the trial court's counsel in the writ proceedings, it became quite obvious that Mr.

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[1]This was the proceeding whereby Mr. Fadem sought review in the California Court of Appeal of the contempt order (See Petition for Writ of Certiorari, p. 8). Such writ proceeding is in the nature of a separate lawsuit, distinct from the controversy at bar. See *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14.

[2]*E.g.*, see the lengthy recitations dealing with law and motion matters relating back a year, and having no conceivable bearing on the direct contempt charged.

Fadem had not raised his voice, and that he was not in the least belligerent. Indeed the tape emphasized what the reporter's transcript quoted in the Petition for Certiorari (p. 4) already shows: that Mr. Fadem was not even permitted to complete a single sentence by the trial judge's outburst. Accordingly, the loud-and-belligerent-voice assertion was quietly abandoned, and the spurious "Findings And Order Re Contempt" were never signed or filed by the trial court. Respondent's present bland reliance on that abortive document, without a candid explanation of its background to this Court, eloquently attests to the disingenuous nature of Respondent's arguments.

Respondent's Assertion That Mr. Fadem ". . . Was Cited Four Times, but Never Adjudged in Contempt . . ." Is at Once a Misrepresentation of the Record and of the Law of California.

Nothing could be more unequivocal than the words of the trial court herein:

> "The Court: Mr. Fadem, there will be a $25 fine *right now*. . . . I *find* you in contempt of court." [Rep. Tr. 1549:17-20, emphasis added].

Nor can there be any cavil about the pertinent language fthe trial court's minute order of February 19, 1968:

> "* * *
>
> The Court *finds* Jerrold A. Fadem in direct contempt of Court *and assesses a fine* in the sum of $25.00 plus the penalty assessment of $10.00" [Clk. Tr. 650, emphasis added].

One cannot help being taken aback by Respondent's boldness in coming before this Court and in the face of that record asserting that "Mr. Fadem, trial counsel for

Petitioners was cited four times, but never adjudged in contempt within the meaning of Section 1211, California Code of Civil Procedure." (Resp. Br. p. 2).

Lest it be suggested to the Court that there is any merit in the semantic juggling of the phrases: *"found* in contempt" vs. "*adjudged* in contempt", Petitioners invite the Court's attention to the well settled California rule that when a trial court finds one in contempt and imposes a fine, the process of contempt adjudication is completed, rendering the trial court *functus officio. Blake v. Municipal Court,* 144 Cal. App. 2d 131, 135; 300 P. 2d 755. In other words, the order of contempt and imposition of the fine completes the adjudicatory process, and thereupon the order of contempt is "final and conclusive". Cal. Code Civ. Proc. § 1222 (Also see *Blake, supra*).

Nor is there merit in Respondent's equally semantics-laden argument that Petitioners' counsel was merely "cited" for contempt (Resp. Br. p. 2). The short answer is that there is no such procedure in California law. There is no such thing as being "cited" for *direct* contempt of court. It is the essence of *direct* contempt that the proscribed acts occur in the presence of the court which *eo instanti* acquires knowledge of them as they occur, and finds that they constitute contempt. Direct contempt proceedings are summary in character. *O'Laughlin v. Superior Court,* 155 Cal. App. 2d 415, 420, 318 P. 2d 71. Thus, one is either in direct contempt of court, or he is not.

It is only in cases of indirect contempt—contempt committed out of the presence of the court and thus unknown to the court when it occurs—that the purported contemnor may be ordered to show cause (Cal.

Code Civ. Proc. §1212) and to stand trial (Cal. Code Civ. Proc. §1217). The latter process (order to show cause) is sometimes colloquially referred to as being "cited" for contempt, and indeed the phrase "cited for contempt" has on occasion been carelessly injected into direct contempt proceedings. Such pseudo-legal colloquiallisms notwithstanding, the difference between direct and indirect contempt procedure is so basic and so well defined in California as to readily qualify for characterization as hornbook law. See *e.g.* the standard California legal encyclopedia: 12 Cal. Jur. 2d, Contempt, §§57, 58, pp. 78-79.

The manner in which the "citation" business crept into the case at bench bears noting as it makes for a sad comment on the state of mind of the trial judge. After Mr. Fadem had filed his petition for extraordinary writ in the California Court of Appeal it became obvious from the petition and papers filed in opposition thereto that the trial court had failed to comply with the statutory procedural safeguards (see Cal. Code Civ. Proc. §1211), spelling out the requisites of holding one in contempt. It was only then that the ingenious suggestion was made that the trial court didn't "find" Mr. Fadem in contempt but rather, "cited" Mr. Fadem.

But the minute order of February 18, 1968, was by then a part of the record and unequivocally showed that the trial court did "find" Mr. Fadem in contempt. And so, two weeks after the minute order of February 19, 1968, (quoted at p. 3, *supra*) was entered, the trial Judge caused another minute order to be entered [Clk. Tr. 680] seeking to blame his clerk for the fact that the minute order of February 19, 1968, recited that Mr. Fadem was "found" in contempt. The fact is, of course, that the clerk was absolutely

correct; he drew the minute order of February 19, 1968, to faithfully reflect the trial court's order as made from the bench. Rep. Tr. 1549:17-20, quoted at p. 3, *supra.*

Conclusion.

More distressing even than the lack of candor permeating the Respondent's Brief, is Respondent's bold attempt at asking this Court to accept the characterization of multiple unwarranted contempt holdings as "trivial". Respondent equivocates about the extent to which it concedes the lack of basis for any contempt holdings (Resp. Br. p. 2), but the cold fact remains that under any standard set by legal precedent or pragmatic courtroom experience, the acts of Petitioner's counsel *did not* constitute contempt.

Petitioners respectfully express here their fervent belief that our judicial system has not reached—and hopefully never will reach—a state where the conduct of proceedings in open court has so deteriorated that *four* unjustified contempt findings in a jury's presence can be tossed off as a "trivial" bagatelle. Due process rights of litigants are too previous to permit that. And if those due process rights are to be preserved, they must perforce rest on a basis more substantial than the temper of a concededly "teed off" trial judge who—as later events tragically demonstrated—held at best a tenuous grip on his faculties.

Relief by this Honorable Court, is plainly called for, and Petitioners respectfully pray that the Writ of Certiorari issue.

Respectfully submitted,

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